

March 30 2010

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA
FILED

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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANABEFORE THE COMMISSION ON PRACTICE OF THE
SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF DIANE KEEFAUVER,

An Attorney at Law,

Respondent.

Supreme Court Cause Nos.
PR06-0255 and PR-06-0698
ODC File Nos. 05-301, 06-049 and 06-057

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

This matter came on for formal hearing on September 17, 2009, in Kalispell, Montana, before an Adjudicatory Panel of the Commission on Practice of the Supreme Court of the State of Montana ("Commission"). Commissioners present and participating were Chairperson Jo Ridgeway, Tracy Axelberg, Sarah Etchart, Rich Ochsner and Jon Oldenburg. Disciplinary counsel, Shaun R. Thompson, appeared. Respondent appeared with her counsel, Douglas J. Wold.

Testimony and documentary evidence was presented at the hearing. Based on the foregoing, the Commission makes the following:

FINDINGS OF FACT

(Findings Applicable to All Complaints)

1. Diane Keefauver, hereinafter referred to as Respondent, was admitted to the practice of law in the state of Montana in 1998. (Complaint, ¶ 1; Tr. 47:21-22)
2. Respondent's market demographic was low-income survivors of domestic violence seeking dissolution. (Tr. 50:20-24)

3. Respondent's records of contacts with clients were generally made at or near the time when the noted events occurred. (Tr. 60:25 - 63:25; 75:24 to 76:3)
4. Respondent's file and billing notations setting forth activities and client contacts are the only written evidence submitted to the Commission addressing said activities and client contacts. Respondent's written record, while not a model of clarity, does not appear to be fabricated.
5. Respondent admitted that she did not respond to ODC's requests that she respond to the three informal complaints addressed herein. (Tr. 223:16 to 224:7; 236:12-14)

ODC FILE NO. 05-301 (ERICKSON)

FINDINGS OF FACT

1. On or about November 16, 2004, Patricia Erickson ("Erickson") retained Respondent to represent her regarding the dissolution of her marriage. On that same date, Respondent prepared a praecipe, summons, TRO, petition for dissolution, and proposed parenting plan. (Respondent's Exhibits 138-162) Respondent and Erickson discussed these documents by telephone later that day. (Respondent's Exhibit 117)
2. Thereafter, on November 22, 2004, Respondent revised the dissolution documents and mailed them to Erickson. (Respondent's Exhibits 101, 112)
3. On November 29, 2004, Respondent mailed an engagement letter to Erickson, mailed the petition, summons and praecipe to Mr. Erickson, and undertook a second revision of the dissolution documents. (Respondent's Exhibits 133, 106, 101, 112) Thereafter, Respondent and Erickson discussed the pending dissolution on November 30, 2004; December 1, 2004; January 10, 2005; January 11, 2005; January 27, 2005; and January 28, 2005. (Respondent's Exhibits 101, 106)

4. On January 31, 2005, Respondent undertook a third revision of the dissolution documents and drafted a waiver of hearing, consent to enter decree and CSED notice. (Respondent's Exhibits 101, 112, 106) The amended petition and parenting plan were given to Erickson. *Id.*
5. On February 1, 2005, Erickson met with Respondent at Respondent's office to read and sign documents. (Respondent's Exhibits 101, 112, 107)
6. Erickson and Respondent spoke by telephone on February 3, 2005, concerning the Ericksons' real property, custody arrangements and holiday visitation issues. (Respondent's Exhibits 101, 107)
7. Erickson contends she was unable to reach Respondent from February 3, 2005, to April 19, 2005. (Informal Complaint, Respondent's Exhibit 204) However, Erickson and Respondent were to meet at Alliance Title Company in Kalispell on February 8, 2005, to deal with a real property issue but Erickson did not show up as scheduled. (Respondent's Exhibits 101, 108, 113) An argument between them ensued by telephone, after which Respondent threatened to withdraw. *Id.*
8. No activity took place in the dissolution over the next two months. Respondent continued to wait on Erickson's preliminary list of assets and liabilities and financial affidavit, originally requested by Respondent in November 2004. (Tr. 80:23 to 81:4)
9. Respondent and Erickson spoke by telephone on April 12, 2005, after which the petition and parenting plan were amended for a fourth time. (Respondent's Exhibit 101)
10. Respondent filed the petition, summons, TRO and parenting plan with the Court on April 20, 2005. (Respondent's Exhibits 175-186)

11. Respondent and Erickson discussed the pending dissolution by telephone on April 26, 2005; May 28, 2005 and June 1, 2005. The parenting plan was amended a fifth time on April 26, 2005 and a sixth time on June 1, 2005. (Respondent's Exhibits 113, 101, 109, 113)
12. On June 1, 2005, Respondent forwarded to Erickson copies of all documents filed with the district court. (Respondent's Exhibits 102, 114)
13. Respondent spoke with Erickson by telephone on August 2, 2005 and August 11, 2005, after which some of the dissolution documents were again revised. (Respondent's Exhibits 101, 114, 110, 115)
14. Respondent and Erickson continued to communicate by telephone from time to time in August 2005. (Respondent's Exhibits 115, 101, 126, 110)
15. It appears that the relationship between Respondent and Erickson deteriorated in October 2005. The records suggest that Erickson may have hired another attorney in October and Respondent testified she sent to Erickson a notice of withdrawal that same month. (Tr. 102:23-25)
16. A series of voice mails were exchanged over the remainder of October. (Respondent's Exhibits 101, 111, 129) On November 7, Erickson left a note on Respondent's office door, wherein she requested from Respondent child support paperwork and "the withdrawal letter." (Respondent's Exhibit 131) Shortly thereafter, Erickson filed her complaint with ODC against Respondent. (Respondent's Exhibit 199)
17. On December 1, 2005, Erickson filed in her dissolution proceeding a "notice of appearance pro say [sic]" wherein she advised the court she had discharged Respondent. (Respondent's Exhibit 214)

18. Kalispell attorney Mark Hash ultimately took over Erickson's representation, securing a decree of dissolution on December 30, 2005. (ODC Exhibit 1)

CONCLUSIONS OF LAW

1. Rule 1.4, MRPC, requires a lawyer to "keep the client reasonably informed about the status of the matter" and to "promptly comply with reasonable requests for information[.]"
2. ODC contends Respondent failed to inform Erickson of the status of her legal matter and failed to respond to Erickson's inquiries. (Complaint, ODC File No. 05-301, ¶ VI) However, as set forth in detail above, there was significant, ongoing communication between Erickson and Respondent during the course of their attorney-client relationship. While it is true there is anecdotal evidence of occasional lapses in communication, we find that these occasional lapses are characteristic of most attorney-client relationships and do not rise to the level of a violation of Rule 1.4. Certainly, ODC's contention is not supported by clear and convincing evidence.
3. Rule 1.16, MRPC, provides that "a lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation."
4. Montana law allows a change of counsel upon (1) consent of attorney and client, filed with the Court, or (2) by order of the Court, upon the application by either client or attorney, after notice from one to the other. Mont. Code Ann. § 37-61-403.
5. Here, Respondent attempted to obtain Erickson's consent by forwarding to her a notice of withdrawal. Erickson, for whatever reason, did not sign and return it. Erickson then took action on her own, discharging Respondent, so advising the district court and retaining new

counsel. Under these circumstances, we find there was substantial compliance with Rule 1.16.

6. Respondent's failure to respond to ODC's inquiries is a clear and convincing violation of Rule 8.1(b), MRPC.

ODC FILE NO. 06-049 (POTTS)

FINDINGS OF FACT

1. On or about September 15, 2005, Mary Potts ("Potts") retained Respondent to represent her regarding the dissolution of her marriage. (Tr. 36:13-18; Respondent's Exhibit 407) Potts paid Respondent one-half of Respondent's required retainer at that time as well. (Tr. 36:19-24)
2. On September 20, 2005, Respondent drafted a number of documents on Potts' behalf including a praecipe, summons, TRO, petition for dissolution, and a proposed parenting plan. (Respondent's Exhibit 403) Because of Potts' indigent status, Respondent also drafted, free of charge, a request to the court for a filing fee waiver and supporting affidavit. *Id.*
3. Potts paid the second half of Respondent's required retainer on October 26, 2005. (Tr. 144:6-10; Respondent's Exhibit 400.1)
4. On October 31, 2005, Respondent mailed to the Court for filing on Potts' behalf a number of documents including the proposed parenting plan, the affidavit regarding Potts' inability to pay the filing fee and proposed order, the praecipe, summons and TRO. (Respondent's Exhibit 404) Copies of these documents were mailed to Potts on November 6, 2005. (Respondent's Exhibits 404, 405)

5. On December 1, 2005, Respondent received the Court's order waiving the filing fee after which the petition for dissolution was filed. (ODC Exhibit 6)
6. On December 30, 2005, Potts left a voice message with Respondent stating that Potts' husband had been served and inquiring as to the status of the case. (Respondent's Exhibits 400.1, 455)
7. On January 9, 2006, Potts' husband appeared in the proceeding through his attorney, Scott Hilderman. (Respondent's Exhibits 453, 458-60)
8. On January 12, 2006, Potts left a second voice message with Respondent. Respondent called Potts back that same day and informed her she would mail Potts a copy of her husband's response to the petition. (Respondent's Exhibit 461) Potts contends this is the last time she heard from Respondent. (ODC Exhibit 5)
9. Respondent received the court's scheduling order on January 14 or 15, 2006. (Respondent's Exhibit 405) The deadlines set forth therein began with March 17, 2006 (the deadline by which pleadings were to be amended and parties added) and ended with the trial date (to occur during the September 18, 2006 trial term). *Id.* Respondent furnished a copy of the scheduling order to Potts.¹ (Tr. 140:2-4)
10. Respondent's file indicates she continued to work on the Potts' matter as late as January 29, 2006. (Respondent's Exhibits 404, 405) On February 21, 2006, Potts wrote a letter to the judge presiding over her dissolution (ODC Exhibit 5), advising therein, in effect, that Respondent had abandoned her. Thereafter, in May 2006, attorney Katherine Maxwell took

¹ There appears to be some inconsistency in the record concerning the dates on which Respondent received documents and when she, in turn, forwarded them to Potts. However, these inconsistencies do not appear to bear significantly on the merit of Potts' Complaint.

over the representation of Potts, completing her dissolution in the fall of 2006. (TR. 8:14-16, 40:20-22)

11. Respondent had provided to Potts her home, office and cellular telephone numbers at the onset of her representation. (Tr. 155:19-25; 156:1-15) Respondent was unaware Potts was unhappy with her services until receiving a copy of Potts' letter to the court, which Respondent did not receive until much later. (Tr. 137:25-138:1-2; 161:6-9)
12. The value of Respondent's services during the course of her representation of Potts was \$1,125.00. (Tr. 163:1-11)

CONCLUSIONS OF LAW

1. ODC first contends Respondent violated Rules 1.1 and 1.3, MRPC, by failing to provide Potts with competent representation and for failing to act with reasonable diligence. (Complaint, Count One.) This claim is not validated by the record. Respondent timely prepared and filed the appropriate documents in pursuit of Potts' dissolution; there was no evidence to the contrary presented.
2. ODC next contends Respondent violated Rule 1.4, MRPC, by failing to inform Potts of the status of her dissolution and respond to Potts' inquiries. The record shows that at the time Potts sent her letter to the presiding judge (February 21, 2006), Respondent had completed all appropriate legal work on her behalf to that point and had in January provided Potts with the two most recent filings in the proceeding: Mr. Potts' response to the petition for dissolution and the court's scheduling order. In short, there was nothing to update. While Respondent's return of telephone messages could have been better, that conduct in and of itself does not, in our view, rise to the level of a clear and convincing violation of the Rule.

3. ODC next contends Respondent violated Rule 1.16(c), MRPC, for her failure to appropriately terminate her representation of Potts and also violated Rule 1.16(d) for her failure to return to Potts any unearned fees. As noted above, it is undisputed that Respondent was unaware of any dissatisfaction on Potts' part until some time after the presiding judge was provided Potts' letter. (ODC Exhibit 5) That letter indicates Potts is attempting to retain a new attorney. *Id.* Katherine Maxwell took over Potts' representation in May and timely concluded the dissolution started by Respondent. There is nothing in the record before us that the temporary absence of counsel inconvenienced or delayed the court or the proceedings. There is no showing that either party was prejudiced. Although Respondent did not properly terminate her representation, under these circumstances it amounts to a technical violation.
4. The evidence is uncontroverted that the value of Respondent's legal services exceeded the amount of the retainer paid by Potts. Moreover, there was no evidence presented that Potts requested an accounting. The claim that Respondent violated Rule 1.16(d), therefore, also fails.
5. Finally, ODC contends Respondent violated Rule 8.1(b), MRPC, for her admitted failure to respond to ODC's multiple communications. Clear and convincing evidence supports the conclusion that Respondent violated this rule.

ODC FILE NO. 06-057 (BRUNS)

FINDINGS OF FACT

1. On or about March 16, 2005, Shawnda Bruns ("Bruns"), a resident of Eureka, Montana, retained Respondent to represent her regarding the dissolution of her marriage. (Tr. 179:22-

25; Respondent's Exhibits 667, 855) Bruns paid to Respondent a retainer of \$1,000. (Tr. 206:1-3)

2. Within a week of the engagement of her services, Respondent prepared on behalf of Bruns a petition for dissolution, summons, TRO, and praecipe and mailed drafts of these documents to Bruns. (Respondent's Exhibit 601) These documents, along with a proposed parenting plan, were filed in the Flathead County District Court on March 21, 2005. (Respondent's Exhibits 668-683)
3. The value of Respondent's legal work through March 25, 2005, was \$800, leaving a retainer balance of \$200. (Tr. 206:8-21; Respondent's Exhibit 860)
4. Bruns' spouse, Willard, initially appeared in the proceeding through Missoula attorney Tom Trigg. (Respondent's Exhibits 686-698) Trigg moved to withdraw on June 10, 2005. (Respondent's Exhibit 602) Thereafter Kalispell attorney Penny Leatzow appeared on behalf of Mr. Bruns on July 18, 2005. (Tr. 13:20-24)
5. It was a difficult divorce. (Tr. 176:16-23) Bruns was often emotional and in addition to Mr. Bruns' changes in counsel, the record indicates there were a number of aborted attempts at reconciliation. (Respondent's Exhibits 601, 604, 617, 636, 637) At one point, Bruns communicated directly with presiding Judge Lympus--against the advice of Respondent--and requested the temporary order of protection earlier secured by Respondent be dropped. (Tr. 178:5-25; Respondent's Exhibits 601, 636, 757) Later, Bruns requested another order of protection. *Id.*
6. On July 18, 2007, attorney Leatzow filed a motion for contempt as to Bruns on the grounds, among others, that Bruns was disposing of marital assets in violation of the court's TRO.

(ODC Exhibit 18) Respondent advised Bruns of the motion and was directed by Bruns to file a “counter” motion for contempt for, among other things, Mr. Bruns’ disposal of and damage to marital property. (Tr. 184:20-25, 185:1-3; ODC Exhibit 21)

7. Respondent filed the counter-motion on July 22, 2005, on her way out of town to attend her sister’s wedding in California. (Tr. 185:12-16) Unbeknownst to Respondent, through an order dated July 21, 2005, the District Court had scheduled a show cause hearing for August 2, 2005, regarding the motion for contempt filed on behalf of Mr. Bruns. (Tr. 185:17-23) Respondent learned of the order and the imminent hearing of the motion upon her return from California on August 1, 2005. (Tr. 186:4-12). It is unclear from the record why Respondent did not receive notice earlier of the upcoming hearing, but as set forth below, the failure to receive notice earlier did not materially impact her client.
8. After reviewing the order, Respondent immediately telephoned both Bruns and opposing counsel. (Tr. 186:13-18) Respondent talked with attorney Leatzow about the possibility of reaching an accord concerning the two pending motions for contempt. (Tr. 186:22-24) Bruns was at risk of being held in contempt, in Respondent’s view, because she had sold some marital assets in violation of the TRO. (Tr. 195:2-12) Reaching an accord with opposing counsel eliminated this risk. *Id.*
9. Respondent also discussed the wisdom of reaching an accord with her client, Bruns, who endorsed the resolution of the contempt issues. (Tr. 230:18-22) Respondent, through her negotiations with Leatzow, accomplished much of what Bruns was seeking through her own motion for contempt, including, among other things, getting Mr. Bruns’ girlfriend out of the family home, causing Mr. Bruns to make payments on the marital home, the vehicle used by

Bruns for transportation, and other ongoing expenses. (Tr. 189:5-11) The accord reached by Respondent and Leatzow was conceptually presented to the court at the August 2, 2005, hearing (ODC Exhibit 22) and formalized thereafter with a stipulated TRO. (ODC Exhibit 23) Respondent discussed the accord with Bruns the next day during a 45-minute telephone conversation. (Tr. 193:8-16)

10. During the fall of 2005, Respondent continued to work on Bruns' dissolution and maintained contact with her. (Respondent's Exhibits 601, 612, 616, 621, 622, 623) There was another suggestion of possible reconciliation in October 2005. (Respondent's Exhibits 601, 623) Leatzow withdrew as Willard Bruns' attorney on December 6, 2005, and two days later Bruns filed with the court a document entitled, "Motion to Dismiss Legal Council [sic]." (ODC Exhibit 24) The court granted the motion on February 8, 2006. (ODC Exhibit 25) At the time of Respondent's termination, accrued legal expenses owed to Respondent by Bruns totaled \$1,575 (net after application of retainer balance). (Tr. 208:5-20; Respondent's Exhibit 861)
11. Thereafter, Kalispell attorney Katherine Maxwell contacted Respondent, advising that she would be appearing for Bruns in the dissolution and requesting a copy of Bruns' file. (Tr. 210:22-25, 211:1-3) Respondent copied Bruns' file and delivered it to Maxwell that same day. *Id.*
12. The record indicates there was regular and frequent contact between Respondent and Bruns during the course of their attorney-client relationship, including many telephone conferences, two office conferences, two jointly-attended court appearances and miscellaneous written communications. (Tr. 183:2-24, 202:5-8; Respondent's Exhibits 620, 627, 629)

13. The Commission notes that Respondent is indigent. She is no longer practicing law, is presently drawing unemployment, is living on food stamps, resides in a low-income studio apartment in Missoula and is currently over \$200,000 in debt with little prospect of repayment. (Tr. 225-226)

CONCLUSIONS OF LAW

1. ODC first contends Respondent violated Rule 1.1, MRPC, by failing to provide Bruns with competent representation. We disagree. To the contrary, Respondent prepared the necessary documents needed to accomplish Bruns' dissolution and related issues and did so under difficult circumstances with a difficult and indecisive client. No criticisms of Respondent's work product were levied by ODC.
2. ODC next contends Respondent violated Rule 1.3, MRPC, by failing to act with reasonable diligence and promptness in representing Bruns. We find no merit to this claim. Respondent promptly prepared the documents needed to accomplish Bruns' goal of dissolution, even though her client waffled as to her true wishes during the course of the attorney-client relationship.
3. ODC next contends Respondent violated Rule 1.4, MRPC, by failing to inform Bruns of the status of her legal matters. There is virtually no evidence in the record before us to support this contention. Rather, the record reveals there was regular and ongoing communication between Respondent and Bruns throughout the course of their attorney-client relationship, including multiple in-person conferences, many telephone conferences and ongoing written communication. While it is true Respondent did not timely advise Bruns of the August 2, 2005, show cause hearing, Respondent herself did not know of the hearing due to her

absence out of state. Once she became aware of the hearing date, Respondent took appropriate action after conferring with Bruns.

4. ODC also asserts Respondent violated Rules 1.2 and 1.4, MRPC, contending she resolved the competing motions for contempt without Bruns' consent. Clear and convincing evidence does not support this assertion. Although there is conflicting testimony as to the circumstances underlying the filing of the stipulated TRO, Respondent's concern that Bruns may be found in contempt of the original TRO appears to be valid. Even in the presence of this conflicting testimony, we conclude that if Respondent were not operating under express authority, she impliedly had the authority to act in her client's best interests, which she did: achieving the relief Bruns sought in her own motion for contempt and insulating her from a finding of contempt against her. See Rule 1.2(a) ("A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.")
5. ODC next asserts Respondent violated Rule 1.16(d), MRPC, for failing to take steps to protect Bruns' interests, including refunding unearned fees and surrendering Bruns' papers following the termination of their relationship. We first note that Bruns unilaterally terminated the attorney-client relationship by filing a motion with the district court in which her dissolution was pending. At that point in time, Bruns owed Respondent over \$1,500 for the legal services she had provided. When later asked by replacement counsel to turn over Bruns' file, Respondent complied on the same day. We find no violation of Rule 1.16(d).
6. Clear and convincing evidence supports the conclusion that Respondent violated Rule 8.1(b), MRPC, by failing to respond to ODC's multiple inquiries.

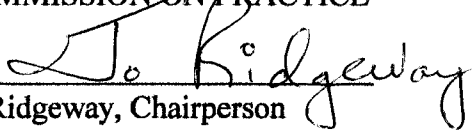
CONCLUSION AND RECOMMENDATION FOR DISCIPLINE

Based upon the foregoing findings of fact and conclusions of law, the Commission recommends that for her failure to respond to ODC's inquiries in the three matters addressed herein Respondent be suspended from the practice of law for a period of 30 days. Because of her indigent status, we do not recommend the imposition of costs and expenses incurred by ODC and the Commission.

DATED this 15th day of March, 2010.

COMMISSION ON PRACTICE

By:


Jo Ridgeway, Chairperson

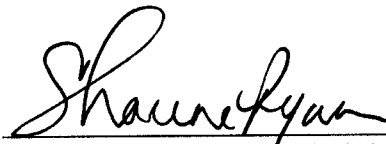
CERTIFICATE OF MAILING

I hereby certify that on this 30th day of March 2010, I served a copy of the foregoing *Findings of Fact, Conclusions of Law and Recommendation* by mailing a copy thereof to:

Diane Keefauver, Esq.
Respondent
1250 34th Street #D202
Missoula, MT 59801

Douglas J. Wold, Esq.
Counsel for Respondent
PO Box 400
Polson, MT 59860-0400

Shaun R. Thompson, Esq.
Disciplinary Counsel
PO Box 1099
Helena, MT 59624

A handwritten signature in cursive script, reading "Shauna Ryan", written over a horizontal line.

Shauna Ryan, Office Administrator
COMMISSION ON PRACTICE